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10  
11     **UNITED STATES DISTRICT COURT**  
12     **CENTRAL DISTRICT OF CALIFORNIA**

13  
14     N.G. AND L.G., minors, by and  
15     through their Guardian ad Litem,  
16     Lilliana Magallon; SARA PEREZ.  
17     Plaintiffs,

18     vs.

19     COUNTY OF LOS ANGELES;  
20     LEROY BACA, DAVID CHEVEZ,  
21     LAURENCE SWANSON, DOES 5  
- 10.

22     Defendants

1      Case No.: CV13-008312-SVW (FFMx)  
2      PLAINTIFFS' MEMORANDUM OF  
3      CONTENTIONS OF LAW AND  
4      FACT

5      TRIAL: August 12, 2014  
6      PTC: July 28, 2014  
7      TIME: 3:00 p.m.  
8      CTRM: 6

9      Assigned to the Honorable Stephen J.  
10     Wilson, United States District Court  
11     Judge

12     **TO THE HONORABLE COURT, ALL PARTIES, AND COUNSEL**  
13     **HEREIN:** Plaintiffs hereby submit this Memorandum of Contentions of  
14     Fact and Law pursuant to Local Rule 16-4 in anticipation of the Final  
15     Pretrial Status Conference on July 28, 2014.<sup>1</sup>

16  
17     <sup>1</sup>Plaintiffs will submit an ex-parte application to continue the trial,  
18     pretrial and related dates due to witness unavailability and the need to  
19     complete expert discovery. Defendants declined to stipulate.

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1                   **Plaintiffs' Memorandum of Contentions of Law and Fact**

2                   **I. INTRODUCTION**

3                   This action arises from the fatal shooting of Jilberto Gutierrez,  
4 father and son of Plaintiffs. At the time he was shot, Mr. Gutierrez was  
5 a patient at Centinela Hospital, admitted to the emergency department,  
6 and brought in by defendants Los Angeles County Sheriff Deputies  
7 David Chevez and Lawrence Swanson. He had been arrested 11 hours  
8 earlier for a non-violent offense. He was taken to the hospital after  
9 complaining of dizziness and chest pain. He later declined medical care.

10                  Mr. Gutierrez was shot through the top of his head while  
11 handcuffed by one hand to the bed rail of the hospital gurney on which  
12 he had been (or was) laying. The circumstances of the shooting are hotly  
13 contested. Numerous nurses and a treating doctor testified that  
14 decedent was calm and cooperative throughout the time leading to the  
15 subject incident. They never heard him raise his voice or act in an  
16 aggressive manner.

17                  Several nurses heard a commotion shortly after 1 a.m. which  
18 sounded like arguing. It was also reported that there was a sound like  
19 the handcuff moving laterally upon the bed rail. One of the nurses  
20 entered the room in time to see the deputy near the head of the bed  
21 using overhand strokes downward onto the patient with an ASP baton  
22 toward or upon the prone patient. With his free right hand, Gutierrez  
23 attempted to protect himself from the numerous blows being struck by  
24 Defendant Chevez. Deputy Swanson reportedly stood near the foot of  
25 the bed, approximately two feet away. One witness described the scene  
26 as "surreal" and partially closed the curtain and moved to leave the  
27 room. Another nurse witness saw the prone patient's legs beyond the  
28 half-pulled privacy curtain and a deputy standing by the foot of the bed

1 apparently physically uninvolved with the patient whose legs were  
2 moving up and down, as though bicycling. This nurse saw the feet of  
3 someone near the head of the bed engaged in some activity. This was the  
4 same deputy seen by the other nurse making overhand strikes to the  
5 prone patient.

6       Although defendants claim an elaborate scenario involving the  
7 handcuffed Gutierrez reaching for a holstered weapon, these nurse and  
8 other independent eyewitnesses dispute this version.

9       Defendants' version of the incident is that decedent reached to his  
10 left, over his handcuffed left wrist, to grab the holstered firearm of  
11 Deputy Swanson who claims he pressed down on Gutierrez's right hand  
12 on the firearm grip to retain the firearm in its specially designed "high  
13 retention" holster. Defendants claim that Deputy Chevez then punched  
14 Gutierrez in the face 5 to 10 times, struck him over the head with 10 to  
15 15 ASP baton blows, then Deputy Swanson removed one of his two  
16 hands over decedent's right hand, deployed pepper spray, *then* decedent  
17 released his grip of the weapon. It is then claimed by defendants that  
18 decedent, despite the foregoing battering, leaped over the bed rail to  
19 which he was still handcuffed and attempted vainly to reach for Deputy  
20 Swanson's still holstered weapon as Swanson continued to back away.  
21 Decedent reached full extension handcuffed to the 320 to 343 pound  
22 gurney and never came closer to Swanson – per defendants' version –  
23 than two feet. It was at that time, that defendants claim that the fatal  
24 shooting occurred. That claim is not supported by any independent  
25 witnesses or any scientific evidence. Reportedly, the Sheriff's  
26 Department sampled Swanson's holster and handgun for fingerprints  
27 and DNA, but no report of any results has been provided in discovery or  
28 otherwise.

1       Even by Defendants' version, decedent was not touching or holding  
2 the firearm when fatally shot through the top of his head, by defendant  
3 Chevez. This shooting was ostensibly from decedent's left – still  
4 handcuffed by his left hand to the gurney's railing – was standing and  
5 reaching for Deputy Swanson some two feet away, as Swanson backed  
6 further away. Yet decedent was shot on the top of the *right side* of his  
7 head. Defendants' sworn version of the incident, subscribed to by both  
8 defendants, was not possible according to the Deputy Medical Examiner,  
9 Cho Lwin, M.D., who examined the wound track during the autopsy.

10       The wound track observed at autopsy in decedent's head, entered  
11 the (top) right parietal area, went sharply downward with a slight right  
12 to left deviation according to Los Angeles County Deputy Medical  
13 Examiner Cho Lwin, M.D. According to Lwin, he observed the wound  
14 track to go sharply downward, severing the brain stem and coming to  
15 rest in the pharynx (at the back of the throat.)

16       Dr. Lwin was shown a photograph of Chevez's demonstrated  
17 shooting position sworn to by defendant Chevez and Chevez's sworn to  
18 position of decedent at the moment of the shooting (also demonstrated  
19 and photographed) then Dr. Lwin stated that the wound track he  
20 discovered would not have occurred from those respective positions.

21       The parties have just exchanged voluminous expert reports and  
22 exhibits; rebuttal expert designation is pending, but expert discovery has  
23 not commenced, though the currently scheduled trial date is mere weeks  
24 away.

25       Additionally, Defendants filed a motion for partial summary  
26 judgment, which Plaintiffs opposed, upon which the Court must rule,  
27 which may also affect the presentation of evidence in the case.

28       The Court bifurcated and stayed discovery as to the *Monell* claims

1 against the County and the state law claims (the fourth, fifth, sixth, and  
2 seventh causes of action) pending adjudication of the constitutional  
3 claims against the individual deputies. (See Docket No. 28.)

4

5 **II. CLAIMS AND DEFENSES (Local Rule 16-4.1)**

6 **A. At trial, Plaintiffs plan to pursue the following claims against the**  
7 **following defendants:**

8

9 **Claim 1:** Plaintiffs N.G., and L.G. have abandoned this claim against  
10 Deputy Kelley-Eklund ,Deputy Gomez and Doe 5; a Rule 41 dismissal  
11 will be filed shortly.

12

13 **Claim 2:** Unreasonable search and seizure –Excessive Force (42 U.S.C. §  
14 1983) by Plaintiffs N.G., and L.G. against Deputy Chevez. Plaintiffs  
15 contend that Defendant Chevez used excessive (and deadly) force against  
16 their decedent in violation of his Fourth Amendment rights and 42 U.S.C.  
17 § 1983. Plaintiffs bring this claim in their individual capacities and as  
18 successors in interest to decedent. They seek wrongful death damages,  
19 punitive damages and reasonable attorneys fees under federal law for this  
20 claim. Defendants Chevez and Swanson were acting under color of law at  
21 the time of the incident.

22

23 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS' SECTION**  
24 **1983 CLAIMS:**

25 As a threshold matter, actions brought under 42 U.S.C. § 1983 requires that  
26 Plaintiffs prove the following by a preponderance of the evidence:

27

28 1. The deputy used excessive force against the decedent and  
2. The excessive force was a cause of injury, harm, pain, suffering and

1 loss of life to Mr. Gutierrez and a cause of the resulting injury, damage, loss  
 2 and harm to Plaintiffs. *See* 9<sup>th</sup> Cir. Man. of Model Jury Instr., § 9.22 (2007).

3  
 4 **Claim 3:** Interference with Familial Relationship (42 U.S.C. § 1983) by  
 5 Plaintiffs N.G., L.G., and Sara Perez against Deputy Chevez and Deputy  
 6 Swanson.

7 The use of deadly force against decedent violated Plaintiffs' Fourteenth  
 8 Amendment substantive due process right to a continued familial relationship,  
 9 companionship and society with their father and son. *Strandberg v. City of*  
 10 *Helena* 791 F.2d 744 (9<sup>th</sup> Cir. 1986); *Smith v. City of Fontana* 818 F.2d 1411,  
 11 140 (9<sup>th</sup> Cir. 1987) overruled on other grounds by *Hodgers-Durgin v. de la Vina*  
 12 199 F.3d 1037 (9<sup>th</sup> Cir. 1999). Both parents and children of a decedent have been  
 13 found to have Fourteenth Amendment protected liberty interest in a continued  
 14 familial relationship. *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th  
 15 Cir.1991).

16 Plaintiffs bring this claim in their individual capacities and seek recovery  
 17 for loss of their decedent's love, companionship, comfort, care, assistance,  
 18 protection, affection, society, moral support, and seek damages, punitive  
 19 damages and attorneys fees under federal law for this claim.

20  
 21 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS'**  
 22 **FOURTEENTH AMENDMENT CLAIMS:**

23 1. Defendants acted with deliberate indifference to the decedent's rights;  
 24 See, *Porter v. Osborn*, 546 F.3d 1131 (9<sup>th</sup> Cir. 2008). Further, whether  
 25 Plaintiffs must prove that Defendants acted with "purpose to harm unrelated  
 26 to a legitimate law enforcement objective" depends on the jury's factual  
 27 determinations as to whether the officer defendants had time to deliberate.

1 **Claim 4:** Municipal liability (42 U.S.C. § 1983) by Plaintiffs N.G. and L.G.  
 2 against Defendant County. This claim was stayed by the Court to be heard at  
 3 a later date. See Docket. No. 28.

4  
 5 **Claim 5:** Wrongful Death by Plaintiffs N.G. and L.G. against Defendants  
 6 Chevez, Swanson, Doe 5. This claim and discovery thereon was stayed by the  
 7 Court to be heard at a later date. See Docket. No. 28.

8 Plaintiffs seek wrongful death damages under state law for this claim  
 9 and allege that the County of Los Angeles is vicariously liable for  
 10 defendants' conduct for this claim. Plaintiffs contend that Defendants were  
 11 negligent in their pre-shooting tactics and in the use of deadly force against  
 12 the decedent.

13 Under California negligence law, "peace officers have a duty to act  
 14 reasonably when using deadly force" *Hayes v. Couty of San Diego* 57 Cal. 4<sup>th</sup>  
 15 622, 629 (2013); *Munoz v. Olin* 24 Cal.3d 629, 634 (1979); *Grudt v. City of Los*  
 16 *Angeles* 2 Cal.3d 575, 587 (1970). Whether the officers were negligent in  
 17 their use of force must be considered under the totality of circumstances...  
 18 including the officers' actions preceding the use of deadly force... "that are  
 19 part of the continuum of circumstances surrounding a single use of deadly  
 20 force." *Hayes, supra*, 57 Cal 4<sup>th</sup> at 637-8

21  
 22 **Claim 6:** Battery by Plaintiffs N.G. and L.G. against Defendants Chevez  
 23 and Swanson. This supplemental state claim was stayed by the  
 24 Court to be heard at a later date. See Docket. No. 28.

25 Plaintiffs contend that Defendants used unreasonable force against  
 26 decedent when Defendant Chevez shot and killed Mr. Gutierrez, causing his  
 27 death. *Munoz v. City of Union City* 120 Cal.App. 4<sup>th</sup> 1077. Plaintiffs seek  
 28 wrongful death damages, punitive damages and attorneys fees under state

1 law for this claim.

2 In the context of a police officer's use of force, a state law battery claim  
3 is a counterpart of a federal excessive force claim and similar standards  
4 apply. *Brown v. Ransweiler* 171 Cal.App.4th 516, 527 (2009); *Edson v. City*  
5 *of Anaheim* 63 Cal. App. 4<sup>th</sup> 1269, 1274-75 (1998)

6

7 **ELEMENTS REQUIRED TO ESTABLISH PLAINTIFFS' BATTERY**  
8 **CLAIM:**

9 1. Defendants used unreasonable force against Mr. Gutierrez  
10 2. Mr. Gutierrez did not consent to that use of force  
11 3. Defendants' use of unreasonable force was a substantial factor in  
12 causing Mr. Gutierrez' death. See, CACI 1305.

13

14 **Claim 7:** Negligence by Plaintiffs N.G. and L.G. Defendants against Chevez  
15 and Swanson. This claim was stayed by the Court to be heard at a later date.  
16 See Docket. No. 28.

17

18 **(C) In brief, the key evidence Plaintiffs rely on for each of their**  
19 **claim is:**

20 (a) testimony of the Plaintiffs  
21 (b) testimony of Defendant Chevez  
22 (c) testimony of Defendant Swanson  
23 (d) Testimony of several witnesses, including Jacob Marhefky, Kimberly  
24 King, Erendira Sanchez-Soto, Bettye Chism, all nurses at the hospital  
25 where the shooting occurred;  
26 (e) Testimony of Dr. Arnold Sin, MD, emergency room treating doctor  
27 (f) Testimony of Los Angeles County Medical Examiner Cho Lwin, M.D.  
28 (g) Testimony of Plaintiff's experts Ronald Scott, ballistics, Thomas

1 Streed, Ph.D., crime scene analysis, police practices expert, Jesse  
2 Wobrock, Ph.D., biomechanics, scene reconstruction, one or more  
3 rebuttal experts to be designated by Plaintiffs.  
4 (h) Testimony of observations and actions taken by Los Angeles County  
5 Sheriff's Department investigators Salerno, Duval, Maxwell and Short.  
6 (i) Photos of the scene  
7 (j) Photos of decedent at scene after shooting  
8 (k) Autopsy report and selected photographs therefrom<sup>2</sup>  
9 (l) Police reports  
10 (m) Testimony of Alex Strouzer, Brenda Shafer, Margaret Kaleuati,  
11 Maryan Nickooshiam, Ronald Scott concerning bullet impact,  
12 trajectories, stippling, gunshot residue, fingerprint, DNA analysis and  
13 other physical/scientific evidence  
14 (n) Plaintiff's funeral and burial expenses  
15 (o) Photographs of decedent with Plaintiffs and family members  
16 (p) Reference to original statements and depositions of the involved  
17 officers and witnesses.  
18 (q) Testimony of Evelyn Davis and Felix Travis.  
19 (r) Plaintiffs' Rebuttal Witness(es) To Be Designated.  
20 (s) Plaintiffs' Expert Economist Robert Johnson or James Mills  
21 regarding economic impact of wrongful death/ violation of civil rights of  
22 Plaintiffs and their decedent Jilberto Gutierrez.

23

### 24 III. ANTICIPATED EVIDENTIARY ISSUES

25 Plaintiffs filed the following Motions in Limine:

26 Motion in Limine No. 1: to Exclude Evidence, Argument, or  
27 Reference to Decedent's tattoos;

28 <sup>2</sup>Plaintiffs have moved *in limine* to exclude decedent's tattoos from  
being shown.

1 Motion in Limine No. 2: to Exclude Evidence of Gutierrez alleged  
2 gang affiliation or membership;

3 Motion in Limine No. 3: to Exclude Evidence, Argument, or  
4 Reference to Prior Arrests, Convictions and Other Bad Acts;

5 Motion in Limine No. 4: to Exclude Evidence That Prior to October  
6 17, 2012 The Decedent Had Possessed, Sold, or Used Illegal Drugs or  
7 Alcohol;

8 Motion in Limine No. 5: to Exclude Evidence That Decedent Had  
9 Possessed Drugs on October 17, 2012 and was under the influence on  
10 October 18, 2012;

11 Motion in Limine No. 6: to Exclude Evidence of Accolades, Awards  
12 or Certificates Received By Defendants or Witnesses;

13 Motion in Limine No. 7: to Exclude Documents, Witnesses and  
14 Opinions Not Properly Disclosed by Defendants or by Defendants'  
15 Experts;

16 Motion in Limine No. 8: to Exclude Evidence or Argument to  
17 Jurors that they Ought to Imagine Themselves in the Same Position as  
18 or Put Themselves in the Shoes of Defendants;

19 Motion in Limine No. 9: to Exclude Evidence that Decedent was "a  
20 Felon" and that he was on Probation;

21 Motion in Limine No. 10: to Exclude Evidence, Inference or  
22 Argument of Any Adverse Consequences that One or More Defendants  
23 May Suffer as a Result of a Plaintiffs' Verdict.

24 Defendants filed the following Motions in Limine, which Plaintiffs  
25 opposed (with two exceptions):

26 Defendants' Motion in Limine #1 to exclude evidence of deputy  
27 tattoos;

28 Motion in Limine No. 2: to Exclude Evidence of or Reference to FBI  
or Other Investigations Involving the LASD (Not Opposed);

1 Motion in Limine No. 3: to Exclude Evidence of or Reference to  
2 Stayed Portions of the Case;

3 Motion in Limine No. 4: to Exclude Evidence of or Reference to  
4 Other Shootings;

5 (There is no Motion in Limine #5 filed by Defendants.)

6 Motion in Limine No. 6: to Exclude Evidence Relating to What  
7 Deputies Could or Would Have Done Differently;

8 Motion in Limine No. 7: to Exclude Accident Reconstruction by the  
9 Coroner, Dr. Lwin;

10 Motion in Limine No. 8: to Exclude Evidence, Testimony or  
11 Argument Regarding the Opinion by the Coroner Dr. Lwin Regarding  
12 Baton Strikes and Their Effect on Consciousness;

13 Motion in Limine No. 9: to Exclude Evidence or Opinions Re:  
14 Accident Reconstruction by Homicide Investigator;

15 Motion in Limine No. 10: to Exclude Evidence or Reference to the  
16 Representation of the Coroner, Dr. Lwin, by Defense Counsel.

17

#### 18 **IV. ANTICIPATED LEGAL ISSUES**

19 Plaintiffs anticipate raising *Daubert*/ Rule 26 non-compliance,  
20 foundation objections to Defendants' designated experts Delhauer,  
21 Spiehler, Trompeter and Hoffman, *inter alia*. Plaintiffs' objections may  
22 take the form of a pre-trial motion or *voir dire* of the purported experts  
23 under FRE 104.

24 Plaintiffs further anticipate that Defendants will assert the  
25 affirmative defense of qualified immunity. However, this is a legal issue  
26 to be determined by the Court, if at all, and not by the jury.

27

#### 28 **V. BIFURCATION**

The Court has already bifurcated the Monell 1983 claim to be tried

1 separately, and the state law causes of action for wrongful death, battery  
2 and negligence. See Docket No. 28.

3 On February 27, 2014, the Court bifurcated trial of the § 1983  
4 claims from the state law claims, and bifurcated trial of the § 1983 claims  
5 against the individual deputies from the § 1983 claim against the County  
6 in accordance with *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th  
7 Cir. 1996). The Court stayed discovery on the fourth, fifth, sixth and  
8 seventh causes of action.

9

10 **VI. JURY TRIAL**

11 Plaintiffs made a timely demand for trial by jury. Plaintiffs will  
12 seek an ex-parte application to continuance of trial due to unavailability  
13 of witnesses, additional time to complete expert depositions and  
14 Defendants' failure/refusal to stipulate to such a continuance.

15

16 **VII. ATTORNEYS' FEES**

17 If plaintiffs' prevail at trial, they are entitled to an award of  
18 attorneys' fees pursuant to 42 U.S.C. 1988, *Hensley v. Eckhart* 461 U.S.  
19 424, 429 (1983), and under state law pursuant to California Civil Code  
20 Section 1021, et seq.

21

22 **VIII. ABANDONMENT OF ISSUES**

23 After meeting and conferring, Plaintiffs agreed to dismiss all claims  
24 against Deputies Gomez and Kelley-Eklund, therefore all claims relating  
25 to false arrest and false imprisonment have been abandoned.

26 DATED: July 20, 2014

Respectfully Submitted,

27 /s/Gary S. Casselman, Esq.  
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